

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Request to Add Private Address Forwarding To the Market
Dominant Product List

Docket No. MC2013-60

PETITIONER'S REPLY TO USPS' RESPONSE TO CLOSING MOTION

January 13, 2014

As the USPS' 2014-01-06 response to my Closing Motion ("Reply of the United States Postal Service to Petitioner's Pleadings Dated December 20, 23 and 26", hereinafter just 'Response') contains multiple gross mischaracterizations of both my views and my legal arguments, I feel that I am compelled to file a reply to clarify the issues raised.

I will try not to reiterate the legal argument detailed at length in my Closing Motion, but merely point out the problems with the Response.

1. The Response claims (p 2¹) that I hold a "belief that the 2006 enactment of section 39 U.S.C. § 3642(a) all but nullifies 39 U.S.C. § 403(a) and, in response to mail user proposals to amend the Mail Classification Schedule, relegates the Postal Service to the limited role of planning and developing the implementation of postal products approved by the Commission".

This is incorrect.²

The USPS indeed has independent authority, based on § 403(a), to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees". However, under § 3642(a):

- a. The USPS may not *change* its services without the PRC's approval.

¹ All page citations are to the Response except where otherwise noted.

² I would suggest that the USPS be rather more cautious in attributing *beliefs* to others.

- b. Ordinary users of the mails have the *same* standing to seek the PRC's approval for new or modified services.
 - c. The PRC, not the USPS, determines if statutory requirements for a MCS change have been met, and must do so in a way that is not arbitrary, capricious, unfounded in (available) fact, unreasonable, or the like.
2. The Response is correct that § 403 must be read in harmony with § 3642 — to the extent possible. However, as detailed in my Closing Motion, where there *is* any conflict, the newer section prevails. The USPS has not disagreed.
3. The USPS does not now have, and never has had, *unilateral* agency authority on matters that are within the PRC's purview, such as changes to the MCS.³

In my Closing Motion (p 6), I merely responded to the USPS' previously-stated claims that it *does* have exclusive authority to propose new products — saying, *arguendo*, that even if the USPS *had* such authority prior to the PAEA, the PAEA revoked it. § 3642 clearly indicates that *the PRC* has unilateral authority to make changes to the MCS.

4. The PAEA granted *statutory* authority to users of the mails to make proposals.⁴
- a. This *new* authority is stronger than merely requesting that the PRC or USPS make a proposal *sua sponte*.

Unlike a previous practice of considering user requests informally, which did not have legal standing, my request does. This proceeding is subject to the requirements of the Administrative Procedures Act, as detailed in my Closing Motion (p 5 *et seq*).

- b. Accepting the USPS' arguments, or interpreting 39 CFR 3020.55(a) as having anything but the narrowest possible reading, would unlawfully make a nullity of that authority.

³ The Response explicitly agrees (p 3: "the Postal Service has never had unilateral or exclusive authority under Title 39 to determine the content of the (domestic) Mail Classification Schedule").

⁴ The Response implicitly agrees (p 4), in that the PAEA made statutory what was previously an informal practice of requesting *sua sponte* actions by the PRC or USPS.

§ 3020.55(a) does not merely say that the PRC "inten[ds] to consider" (p 7) the position of the USPS. Rather, it says that the PRC will approve a proposal "*only* to the extent the modification is consistent with the position of the Postal Service".

It is both lawful and wise for the PRC to *consider* the USPS' position. Indeed, this is what § 3020.54 requires. I take no issue with 3020.54 — to the contrary, I believe that a 3020.54 response *must* address the issues 39 USC 3642(b) and 39 CFR 3020.52, so that the PRC is properly informed of the USPS' factually based beliefs about whether a proposal would be consistent with Title 39.

However, the PRC may not *be constrained by* the USPS' position (lest it be an unlawful delegation of authority); nor may it base its action under § 3642 on a USPS position that is not pertinent to the elements thereof; nor should the PRC give any standing whatsoever to a "position" that amounts to nothing more than "not invented here".

A liberal interpretation of § 3020.55(a) *would* unlawfully "give the Postal Service the power to veto any Commission preference to review or approve a mail user classification proposal" — for instance, if the USPS were to adopt a "position" of rejecting proposals that threaten its management (regardless of their consistency with Title 39), its position of opposition would seemingly preclude the PRC from approving such a proposal.

This is why I moved the PRC to clearly state, to cure ambiguity, that it gives only the narrowest possible reading to § 3020.55(a) — namely, one that it is *limited* to "ensur[ing] that the Mail Classification Schedule complies with the policies of Title 39" (p 7), and does not encompass any deference to the USPS' mere "position" or "views".

5. Contrary to the Response (p 5), I neither asserted that the PRC is authorized to declare the USPS' response to my FOIA request unlawful, nor requested the PRC for any relief under the FOIA.

The USPS' response was unlawful, and the PRC should take notice thereof as part of the USPS' pattern of refusal to produce documents relevant to this proceeding.

In particular, the PRC should take notice that the USPS claimed, in its determination on administrative appeal denying my FOIA public interest fee waiver, that documents material to informing this proceeding were not a matter of "public interest". This rejection was founded only in a baseless assertion that I have a "private litigation interest" in the documents sought, and completely ignored all elements of a public interest fee waiver analysis (listed mere paragraphs above).

The PRC should compare this to the (nigh unique) *statutory* statement made by Congress, in 39 USC 505, that there is a public interest so high as to merit a *mandate* that the Commission designate an officer to represent that interest in *all* public PRC proceedings, including this one.⁵ The documents I sought were solely those relating to this proceeding, and were disclosed (as promised) on the public docket. One could hardly have a more definitional example of a public interest FOIA request.

I have filed a petition for review of the USPS' unlawful response to my FOIA in federal court, as that is the appropriate venue for FOIA relief from the USPS' administrative action in denying my request. My alternative motion requested that, should the PRC not grant the discovery I requested, it stay this proceeding until that appeal has concluded, so that a decision may be informed by the PRC's own reading of relevant documents.

However, the PRC *does* have authority over the USPS' regulations. Accordingly, I requested that the PRC review 39 CFR 265.9(g)(3)(v)'s "personal interest" clause for its lack of statutory authority. The statutory standard is whether disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester" (5 USC § 552(a)(4)(A)(iii)). The US Code does not permit the USPS to even *consider* whether the requester has a "personal" interest, and that rulemaking exceeded the USPS' discretion.

6. The USPS *has* claimed superior standing under § 3642, and *has* claimed (both explicitly and implicitly) an exclusive right to propose new products.

⁵ which is not, incidentally, "an administrative hearing" as stated in the denial letter

The Response's claim (p 6) that "the Commission will look in vain for any such claim having been made by the Postal Service" rather invites a list thereof (emphases added):

- 2013-10-16 USPS initial comments:
 - (p 2) "the Commission should ... refrain from directing the Postal Service to expend resources to analyze or develop any form of the proposed product concept beyond any the Postal Service may *independently choose* to expend for the purpose of examining the feasibility of product proposals for potential submission"
 - (p 2) "The planning and development of postal services is *reserved* to the Postal Service by section 39 U.S.C. § 403(a)."
 - (p 10-11) "The opportunity to affect postal services ... should not be misread to overtake the Postal Service's responsibilities and *prerogatives* to determine postal policy and operations, or to lead to Commission determinations that would, among other things ... interfere with *the process of determining new product concepts the Postal Service should explore* ... The Postal Service consider that, in this instance, it would not be appropriate ... for the Commission to *schedule or require negotiations or dialogue between the Postal Service and a requester under section 3642(a)*."
- 2013-10-16 USPS reply to scheduling motions
 - (p 2) "As the "first among equals" before the Commission..."
- 2013-10-28 USPS reply to motion for discovery
 - (p 1-2) "In considering its options under Rule 55(b), the Commission must assess, inter alia, the limits of its role under section 3642 to add new products to the Mail Classification Schedule (MCS) in light of the grant of *primary authority* in section 403(a) *to postal management* in the planning and development of postal services to offer to the public. In doing so, the Commission should take care not to impose upon the Postal Service any obligation to plan or develop any product or service currently not in existence ..."
 - (p 3) "It appears from Petitioner's Motion for Discovery that these revelations have given rise to hope that the Digital License Plate concept may have achieved elevated status in the competition for scarce financial, analytical and developmental resources at postal headquarters. However, when read objectively, the October 16th Reply offers no basis for concluding that the concept has gained any such traction internally." [implying that such USPS management dictated 'elevated status' is a requirement for PRC's evaluation of mail users' § 3642 proposals]
- 2013-12-20 USPS reply comments
 - (p 2) "The Postal Service also explained that the concept was one of many product concepts that were candidates for cross-functional feasibility analysis, but has not yet been subjected to such review." [again implying that such management-dictated analysis is a prerequisite for § 3642 proposals]
 - (p 9) "It also may be Petitioner's view that the enactment of section 3642 ...

nullified the section 403(a) authority to develop and plan new postal products that was granted to the Postal Service by enactment of the Postal Reorganization Act of 1970. ... [S]ections 403(a) and 3642(a) must be read ... in a manner that recognizes that Congress has granted neither the Commission nor the Postal Service unilateral authority to determine the content of the Mail Classification Schedule." [denying the clearly unilateral authority for MCS changes given to the PRC in § 3642]

- (p 9-10) "... by ... 39 C.F.R. § 3020.55(b), the Commission has discretion to ... accord broad deference to the Postal Service, which is charged by section 403(a) with the responsibility to plan and develop postal services."
- (p 10) "In the absence of an obligation to create a particular product to fulfill a specific statutory mandate or to correct a perceived mail classification deficiency in response to a section 3662 complaint, the Commission should accord postal management broad deference in determining which postal product concepts to consider and prioritize for research, analysis and development."
- (p 11) "[T]he "information necessary to go forward" with a PAF product concept would seem to be the fruits of an exhaustive cross-functional feasibility analysis conducted by various components of postal management..."
- (p 13) "When exercising its authority under section 3642(a), the Commission should give careful consideration and due regard to the Postal Service's authorities and responsibilities under 39 U.S.C. § 403(a), the statutory scheme, and the policies embodied in the Title 39 U.S.C. In this instance, the Commission should *defer* to the Postal Service's responsibilities and prerogatives ... as determined by postal management."

It is the completely unambiguous reading of its formal filings that the USPS has asserted that the PRC should not approve any proposal unless the USPS itself proposed it.

On 2013-10-18, I spoke by phone with USPS attorney Michael Tidwell, one of the signers of the Response. In that call, he said that he (or his client) believes that the PRC should not approve any proposal asking the USPS to do something new without the USPS itself first determining that it is feasible (as the Response itself says). In particular, he said that members of the public should not be permitted to make proposals under § 3642 for *new* products, but only for *modifications* of existing products — and that only the *USPS* should propose new products.

And "for the record" (p 12 fn 14): after that call, Tidwell provided me with the contact for USPS' VP for Digital Solutions, Randy S. Miskanic, explicitly as a point of contact *for*

making my FOIA request, not as a contact for discussion. I instead directed my FOIA request through the USPS' online FOIA request form, to comply with USPS best practices. At no point did Tidwell, Miskanic, or any other USPS representative contact me to discuss how PAF might be modified or made more easily feasible; the discussion with Tidwell was focused solely on the USPS' legal positions and procedural matters.

In my phone and email conversation with Public Representative James Waclawski, he specifically described the USPS as having a "not invented here" culture unwilling to seriously consider external proposals and unable to answer Congressional hearings asking for real product innovation. The USPS' response in this proceeding is illustrative.

The USPS fundamentally claims that no product proposed by a user of the mails should be approved under § 3642 unless postal management independently chooses (based on secret priorities) to give it formal "cross-functional feasibility analysis". Such a requirement would necessarily give the USPS an unlawful delegation of the authority exclusively reserved to the PRC to approve new products. It would also nullify the statutory ability of users of the mails to make proposals, as they would be relegated to merely petitioning *the USPS* (rather than the PRC) for a determination *by the USPS* (rather than the PRC). This is simply not supported by Title 39.

My characterizations of the USPS's position, which it mentions in footnote 23, are blunt but completely fair and accurate, and I stand by them.

7. The USPS (fn 13) did not fully respond to my invitation. The USPS website may have a buried "suggestion" page. However, what new products has the USPS developed (or changed) as a result of such suggestions — and how do they compare to the number that were changed as a result of suggestions by more privileged entities such as PostCom members?
8. I did not say that the Commission is "*required*" (p 8) to initiate further proceedings "simply because a proposal "seems likely" to satisfy the criteria of Title 39". Rather, I said that the PRC *should* do so, since action under § 3020.55(c) implies some sort

of preliminary determination (i.e. that there is yet insufficient basis to either approve or deny the proposal).

9. The USPS has yet again⁶ raised the red herring of a question of "unreasonable discrimination", a formal complaint, or a *requirement* to institute PAF. I explicitly *denied* such claim.⁷

The USPS states (p 9) that "in the absence of a statutory mandate compelling the establishment of a particular product or a finding, for instance, of unreasonable discrimination, the Commission should exercise restraint". In blunter language, the USPS asserts that the PRC should deny any § 3642 proposal for a new product that the USPS itself did not present or approve, unless compelled otherwise by a complaint.

§ 3642 makes no reference whatsoever to 39 USC § 403(c), nor is it even vaguely *implied* that a proposal should be adopted only to remedy a complaint. There is a separate process (39 USC 3662) to address such matters. Again, the statutory canon against of surplusage dictates that § 3642's grant of authority to "users of the mails" to propose "new products" *cannot* be construed to be limited to addressing "unreasonable discrimination" remedy — nor even that the PRC should "exercise restraint" on proposals in the absence of such a complaint.

10. I have not asked the Commission to "compel the Postal Service to commit the necessary capital resources and re-direct the activities of its Information Technology, Engineering, Network Operations and Marketing departments and adversely impact existing approved and funded projects and timelines underway by these functional organizations for the purpose of determining the feasibility of the Private Address Forwarding concept." (p 9) Again, I explicitly *denied* such claim.⁸

11. The USPS (p 9) has not countered my argument that the PRC's mandate *under the*

⁶ See e.g. USPS reply to motion for discovery, p 2; USPS reply comments, p 10

⁷ 2013-10-29 Petitioner's response to USPS opposition to discovery, p 4

⁸ 2013-12-20 Closing Motion, p 12

APA requires it to make the kind of review I argued for in my Closing Motion.

12. The PRC is *mandated* by § 3642(b) that *all* "determinations" under 3642(a) be made in accordance with specified criteria. 39 CFR 3020.55 says the PRC "shall review ... to *determine* whether the [proposal] ... complies with applicable statutory requirements and the Commission's rules ...". (emphasis added)

As I said in my Closing Motion, the PRC does in general have broad procedural discretion, subject to 5 USC 706(2). However, there is *no* discretion on this particular question — a § 3020.55 action is a "determination", subject to § 3642(b)'s requirements.

13. The USPS continues to avoid actual claims about PAF's merits or lack thereof.

The USPS insinuates (p 11) that "the technical and operational feasibility of the mail user's concept would require significant enhancements to current letter, flat, and parcel mail processing equipment, automation recognition technology, and integration of new technology with legacy technologies and systems".

However, the USPS has not actually *stated* that this is true, nor given any basis to believe it. To the contrary, the very next page states that "[d]ue to the many unknown variables that would determine feasibility of such an initiative, the Postal Service offers no judgment on the potential merits of Petitioner's proposal."

As I said in my Closing Motion, there simply is not enough evidence on the record to judge the merits of my proposal.

The USPS has *not* (p 17) "provided access to documents describing its internally-generated product concepts at page 3 of its October 16th Comments"; rather, it gave a biased and partial summary thereof. It admits that (undisclosed) "[n]arrative descriptions or sketches exist" (p 18). Its partial FOIA release to me⁹ did not include more than short trademark descriptions and a single presentation on Mail My Way.

I am not confusing (p 19) "(a) the Postal Service's routine protection of its intellectual

⁹ pages 5-20 of my 2013-12-26 addendum, which seem to have been overlooked by the USPS in p 17 fn 17

property rights in a concept or name, or its judgment that such an idea or name is ""serious" enough to warrant such protection with (b) the more complicated, costly and serious processes of determining the technical or operational feasibility of that concept, or determining its cost or marketability".

Obtaining a patent or trademark is a significant process — routine and prudent to do early, but nevertheless reserved for concepts that merit at least the time and expense of an IP lawyer. Though they may not have undergone the full "feasibility analysis", they will have had *some* analysis, documents, presentations, arguments, or the like justifying that expense. "[P]reliminary assessments of the relative merits of various concepts must be made (and regularly reassessed) for the purpose of establishing and updating investigative priorities..." (2013-12-20 USPS reply comments, p 5-6).

Those documents about PAF-like concepts would inform the PRC about PAF's plausibility — even if those documents are not the "feasibility analysis" that the USPS seems to assert are the *only* acceptable level of documentation.

USPS footnote 19 seems to ignore that my distinction between PAF and *Mail My Way* was to show that PAF, at its core, is *simpler* than MMW — and thus likely *more* feasible.

The USPS agrees (p 14) that the PRC "preference for making informed judgments and seeking information from its most likely sources is reasonable" — and indeed, that is all I've asked the PRC to do here: to make an *informed* judgment.

That is why I did not ask the PRC to approve my proposal at this point. Rather, I moved that it institute *further proceedings and discovery* — to obtain documents from the USPS that would allow it to make its own, *independent* evaluation of those merits.

14. The USPS denies having done a "feasibility analysis" (i.e. its own internal procedure for approving a product). It does *not* deny having documents that would be relevant to the PRC's own determinations under § 3642.

Again, I explicitly said this in my Closing Motion.

I did not assert (p 16) that the USPS has "some definitive feasibility analysis". I asserted that it has documents *relevant* to an *independent* analysis of PAF's feasibility.

The USPS' footnote 16, comparing PAF to "mail service from Earth to Mars", is simply inappropriate, and its hyperbolic analogy does not hold up to the issues discussed here.

15. The USPS confuses its internal review process before submitting a § 3642 request (for which it may require whatever "cross-functional feasibility analysis"¹⁰ or priority determinations it wishes) with § 3642's actual requirements.

The PRC is not obligated to conduct the USPS' version of "feasibility analysis". Nor may it give any deference whatsoever to USPS management's choice of what proposals to prioritize (as to do so would effectively give USPS management unilateral authority to reject third party proposals — not to mention that the USPS has argued that it should not disclose such priorities *even to the PRC*). Rather, the PRC is obligated only to determine whether a proposal meets the criteria enumerated in Title 39.

Again, making a USPS "feasibility analysis" a *requirement* of accepting a § 3642 proposal would nullify the grant of power to "users of the mails", by making USPS management able to unilaterally decide whether or not to approve a proposal.

16. The USPS claims (p 20) that it is my view "that the Commission has ... the unfettered authority to command the Postal Service to expend whatever resources and establish whatever product development priorities are necessary to resolve the feasibility of any product concept brought to its attention in the form of a petition filed under 3642(a)" and that "the Congressional interest in innovation all but compels the Commission to command the Postal Service to make Private Address Forwarding feasible so that it can be implemented."

This is false.¹¹

It is my view, and a plain reading of the law, that the PRC has the authority to command the

¹⁰ 2013-10-28 USPS reply to motion for discovery, page 3

¹¹ Again, I find it rather assumptive for the USPS to presume to know *my* beliefs and views better than I do.

USPS to turn over documents that are relevant to its proceedings — and that in this situation, the PRC is obligated to obtain documents easily available to it in order to avoid making an arbitrary and capricious decision.

Should the PRC make a reasonable, *informed* decision that PAF does not meet § 3642's criteria, then it would be acting within its authority. Should it determine that PAF *does* meet those criteria, then it need not reach any further conclusion before adding PAF to the MCS. Should it determine that there is not enough information to make such a determination, then further proceedings would be warranted (as is currently the case).

Yet again, the USPS is raising a red herring. I have asked merely that the PRC fulfill its statutory obligations and conduct meaningful "review" that fulfills my rights of due process under the APA. I have not asked the PRC to command the USPS to conduct any new investigation. And again, I explicitly stated this in my Closing Motion.

17. There has not been (p 25) "ample opportunity for public comment", as the public has not been adequately informed. After discovery, both the PRC and public will be better able to *independently* evaluate the merits of PAF (based on information from similar proposals), and further public comment would be merited.

18. Contrary to the USPS' claim (p 26) that my motion for discovery is motivated by a desire to reverse the impact of the USPS' (unlawful) denial of my public interest fee waiver, the exact opposite is true: I made the FOIA request so that the public might be better informed in commenting on the proposal, in case (as did in fact happen) the PRC denied my motion for discovery on purely procedural grounds.

The USPS failed to respond to my expedited processing request within the time required by law (as it admitted in its FOIA correspondence); the unfortunate result is that the public has not had any chance to comment based on evidence.

In any case, the PRC has clear authority and duty to order discovery here, completely independent of my rights under the FOIA. It is hardly "an abuse of the Commission's discovery rules" (p 27) to move for discovery of documents directly pertinent to an

independent determination of the statutory criteria stated in § 3642.

19. I did not ask for discovery regarding *PAF* (p 26, 2(a)); rather, I asked for discovery regarding the *PAF-like* proposals that the USPS has developed.

Yet again, I must emphasize that I did not ask for USPS' formal "feasibility analysis to resolve technical and operational issues related to such concepts as Digital License Plate and Mail My Way" (p 27), but rather documents *about* those concepts which would help a *third party* make an assessment, and which are *already* possessed by the USPS.

20. The USPS' objections to public disclosure of certain information (p 27-28) do not argue that treatment under 39 CFR 3007 would be insufficient — and § 3007 is *specifically* designed for such material.

If the PRC agrees under § 3007.33 with the USPS' argument (p 28) that it would suffer economic injury from public revelation of certain documents, it can order discovery under seal (and provide me with a copy thereof, under § 3007.40).

Conclusion

The USPS has simply failed to counter my arguments that only the PRC is charged with making § 3642 determinations; that requiring USPS "cross-functional feasibility review" or requiring the USPS "position" to agree with a proposal would *de facto* nullify an explicit act of Congress; that the APA and PAEA require certain minimum standards for PRC determinations in this matter; that the PRC and public would be better informed to make their *own* determinations if they possessed the documents held by the USPS regarding previous PAF-like proposals; that discovering its documents would not be intrinsically harmful nor exceed the PRC's authority; that some sensitive documents could, if necessary, be handled adequately under § 3007; etc.

My Closing Motion, at core, comes down to one thing: that the PRC, being the *unilateral* authority charged with making specific statutory determinations for § 3642 proposals, should obtain evidence *currently available to it* from the USPS using the powers it was given specifically for that purpose, as to do otherwise would be an abuse of discretion.

Sincerely,
Sai
Petitioner

usps@s.ai
+1 510 394 4724
PO Box 401159
San Francisco, CA 94110